NO. 84-678

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

R. J. WOLF, PETITIONER,

vs.

BANCO NACIONAL DE MEXICO, S.A., RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT

Respondent's Brief in Opposition has raised first certain arguments to which this Reply is limited, and addressed.

Respondent asserts at page 6, note 7, under the guise of restating the case below, that no finding that Banamex defrauded Wolf would have been supportable on the record because information concerning the possible devaluation of the peso was available apart from the brochure that painted an entirely different and much rosier picture -- information Banamex itself produced below, of which it was obviously aware, and of which Wolf denied under oath he had ever heard. Moreover, Wolf specifically declared under oath he was absolutely unaware of the possible devaluation of the peso prior to any of his investments. The miniscule fluctuations in the rates of exchange beforehand

were normal, everyday occurrences in the money market that in no way portended the devaluation. And the Chairman of Banamex's Board of Directors was a member of the Advisory Board of the Banco de Mexico at and prior to the time the decision was made to withdraw its support of the peso. Thus, the record establishes without room for doubt that Banamex had at the very least constructive knowledge the peso would be devalued, and Wolf had no actual knowledge. Liability under Section 12(2) of the Securities Act of 1933, 15 U.S.C. §77 l(2), was proved. It provides,

> Any person who ... offers or sells a security ... by the use ... of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise or reasonable care could not have known, of such untruth or omission, shall be liable ... for damages

Scienter on the part of Banamex was not required to establish this particular violation. Noting that securities fraud is "light years" away from common law fraud, Herman & MacLean v. Huddleston, 103 S.Ct. 683 (1983), said,

> Liability against the issuer of a security is virtually absolute, even for innocent misstatements ...

A mere omission to tell Wolf all it knew about the possible devaluation of the peso was sufficient to establish Banamex's liability for damages.

Aaron v. SEC, 446 U.S. 680 (1980), in construing the identical language of Section 17(a)(2) of the Act, 15 U.S.C. §77 q(a)(2), also held scienter was not required. In discussing that section, Loss, III Securities Regulation, 1433, points out,

> It is now quite clear that a half-truth is as bad as an outright lie ... Clause (2) of §17(a) of the Securities Act ... is specifically aimed at half-truths ...

and Tennyson's The Grandmother reminds,

> That a lie which is half a truth is ever the blackest of lies, That a lie which is all a lie may be met and fought with outright, But a lie which is part a truth is a harder matter to fight.

Of course the burden of proving it neither knew, nor in the exercise of reasonable care could have known, of the possibility the peso would be devalued, belonged to Banamex, 15 U.S.C. §77 l(2); Carrott v. Shearson Hayden Stone, Inc., 724 F.2d 821 (CA9 1984), a burden it never met (and could never meet) in light of the information it had. And only actual knowledge on the part of Wolf could defeat his recovery under that section. Bromber & Lowenfels, 3 Securities Fraud, §8.4 (317); Sanders v. John Nuveen & Co., 619 F.2d 1222 (CA7 1980); cert.den., 450 U.S. 1005. As held in Hill York Corp. v. American Int'l Franchises, Inc., 448 F.2d 680 (CA5 1971),

> The defendants' argument concerning the availability of information to the plaintiffs is equally unavailing here. The plaintiffs do not have to prove that they could not have discovered the falsity upon reasonable investigation [cit.om.]. To put it simply, the availability of information elsewhere does not excuse misleading or incomplete statements [cit.om.]. Finally, the record contains abundant evidence supporting the fact that the plaintiffs were indeed ignorant of the untruths and omissions.

See also, Gilbert v. Nixon, 429 F.2d 348 (CA10 1970); Johns Hopkins University v. Hutton, 422 F.2d 1124 (CA4 1970); Spatz v. Borenstein, 513 F.Supp. 571 (E.D.Ill. 1981); In re Itel Securities Litigation, 89 F.R.D. 104 (N.D.Cal. 1981).

Essential though it was to clarify the record here and now, securities fraud per se formed no part of the decision of either court below and is therefore not before this Court.

> The court does not reach these fraud claims. Both parties have moved for summary judgment on the dispositive issue of whether plaintiff's time deposits were securities. If the

> deposits were securities, then Banamex is strictly liable under the 1933 Act for failing to register them. If the deposits were not securities, then this Court has no jurisdiction over any of plaintiff's claims. (Pet.App. 28)

Although the district court proceeded to hold the time deposits were indeed securities, and that Banamex was strictly liable to Wolf as the statute provides, 15 U.S.C. §77 l(l), the amount of damages has not yet been decided because the pure, legal securities question was thereafter certified pursuant to 28 U.S.C. §1292(b),

> The issue whether the peso accounts are securities clearly involves a controlling question of law as to which there is substantial ground for difference of opinion. An immediate appeal may materially advance the ultimate termination of the litigation since reversal of this Court's order would end it. (Pet.App. 82)

Nor did damages form any part of the decision of the court of appeals. Yet Respondent's Brief in Opposition, at page 24, now asserts that petitioner suffered no

recoverable damages under the 1933 Act and is thus "asking this Court to undertake a theoretical, advisory task." Again, the record demonstrates, and each of the courts below found, that Wolf suffered a loss of principal in the amount of $24,464. (Pet. 3; Pet.App. 5, 26). His complaint sought recovery of that, interest, punitive damages, "and such other relief, legal or equitable, as the Court may deem appropriate".

15 U.S.C. §77 l quite clearly provides that in the event of the sale of an unregistered security, the buyer is entitled "to recover the consideration paid for such security with interest thereon" or "damages if he no longer owns the security". In no way does the Act except or exclude any kind of loss from its coverage; rather, §77 p says,

> The rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.

As Herman & MacLean v. Huddleston, supra, declared in discussing that section,

> the remedies in each Act were to be supplemented by "any and all" additional remedies.

To be sure, Wolf suffered, at least in part, losses that were attributable to the currency devaluation that occurred. But those same losses were equally attributable to Banamex's offer and sale of these fixed term peso accounts in violation of the registration provisions of the Act. And of course it was Banamex that benefitted by the same $24,464. it never returned to Wolf. Disgorgement has long been an additional remedy under the securities laws. See, e.g., Nelson v. Serwold, 576 F.2d 1332 (CA9 1978), a 10b-5 case, but relevant,

> ... the recent trend looks to defendant's profits, rather than to plaintiff's losses, in measuring damages ... To allow violators of the Act to profit by their misconduct would undermine the deterrence that the Act was intended to effect.

Nor is there anything in the 1933 Act or elsewhere that precludes the recovery of currency devaluation losses, or, for that matter, any other appropriate award. Under another act, Silkwood v. Kerr-McGee Corp., 52 L.W. 4043 (January 11, 1984) declared,

> ... it is Kerr-McGee's burden to show that Congress intended to preclude such awards [cit.om.]. Yet, the company is unable to point to anything in the legislative history or in the regulations that indicates that punitive damages were not to be allowed.

Banamex can point to nothing here either.

Currency devaluation losses have always been recognized for tax purposes, and allowed as deductions,

> Foreign currency is treated like property or a commodity. Thus a taxpayer may have gains and losses from dealings in it. These gains and losses may result from official revaluation, day-to-day fluctuations in the rate of exchange, or other factors. For example, a taxpayer who buys foreign currency and then sells it after devaluation would have a deductible loss.

1983 Federal Tax Coordinator 2d, Vol. 10,

¶ G-7011, p. 24,410, and cases and authorities cited therein. To the same effect see, Ltr. Rul. 7923009, Technical Advice Memorandum, 2/9/79; 5 Mertens Law of Federal Income Taxation, §28.82, and authorities therein.

Foreign currency devaluation losses must be recoverable under the Act if options and privileges relating to foreign currency are, and always have been, subject to the Act; see, 15 U.S.C. §77 b(1); 1982 U.S. Code Cong. & Adm. News, 2780-2789. Fluctuating value risks may -- or may not be -- outside the control of the issuer; nevertheless, it is protection against such risks that the Securities Act of 1933 was meant to provide. That is why the issuer's liability is virtually absolute, Herman & MacLean v. Huddleston, supra, and for reasons Congress has long deemed essential.

In its final attempt to defeat the petition Respondent's Brief in Opposition at page 27 has interjected another nonissue into this proceeding: the spectre of "adverse international repercussions" if a foreign bank were required to comply with our laws when engaging in commercial activities here. As the Securities and Exchange Commission pointed out to the court of appeals below,

> Foreign banks that wish to sell their time deposits in this country without Securities Act registration may do so by issuing them in this country from domestic branches that are subject to federal bank regulation ... To permit foreign banks to compete with U. S. banks for deposits in this country without being subject to either federal banking or securities regulation would be contrary ... [to the International Banking Act] ...
>
> Application of the registration provisions would not cause foreign banks to curtail their activities with U.S. residents ... Foreign banking institutions have filed registration statements with respect to their securities, including certificates of deposit, ... Foreign banks can take advantage of the Commission's Integrated Disclosure System for Foreign Private Issuers, which provides for short-form registration of foreign securities ... This short-form registration is similar to

> that provided for domestic securities. In addition, foreign banks like Banamex can file a registration statement similar to the ones that U.S. bank holding companies file under Rule 415, 17 C.F.R. 230.415. This procedure would permit an issuer to file one registration statement for the entirety of its certificates of deposit which are issued at different times with varying interest rates and maturity lengths.

Brief of the Securities and Exchange Commission Amicus Curiae, pp. 11, 17.

The sovereign right of this Nation to enforce the laws of the land is certainly second to no imaginary risk of reprisal. In Container Corporation of America v. Franchise Tax Board, 51 L.W. 4987 (June 27, 1983), this Court stated,

> The most obvious foreign policy implication of a state tax is the threat it might pose of offending our foreign trading partners and leading them to retaliate against the nation as a whole ... In considering this issue, however, we are faced with a distinct problem. This Court has little competence in determining precisely when foreign nations will be offended by particular acts, and even less competence in deciding how to balance a

particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please.

CONCLUSION

There is neither any issue of fraud or of damages before this Court, only the pure, simple, unfettered legal question of a security. It is ripe for and deserving of review now for all of the reasons stated, not the least of which is that for those countless thousands of "others similarly situated" (which Respondent's Brief in Opposition at page 27 acknowledges exist) there is no tomorrow; they have no other remedy; their claims will be decided by this case.

RESPECTFULLY SUBMITTED,

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